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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1479

THE JUSTICES OF THE BOSTON
MUNICIPAL COURT,
Petitioners,

v.

MICHAEL LYDON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

I. Does the Double Jeopardy Clause permit the Commonwealth of Massachusetts to subject Michael Lydon to a trial *de novo* where the evidence at his first trial was insufficient as a matter of law?

II. Is habeas corpus available to prevent a trial *de novo* which would violate a petitioner's double jeopardy right not to undergo a second trial for the same offense?

III. Is a defendant released on personal recognizance after a *de novo* appeal from a conviction and two year sentence in custody for the purpose of habeas corpus?

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BRIEF OF THE RESPONDENT

STATEMENT OF THE CASE

Michael Lydon was charged in the Boston Municipal Court with illegal possession of burglarious implements. He exercised his option to participate in the Massachusetts system of trial de novo. M.G.L. Ch. 218, §26A. He was

never informed that a consequence of this choice would be to permit the prosecution to bolster its case if he appealed for a trial de novo after a conviction based on inadequate evidence. Lydon v. Justices, 536 F.Supp. 647, 651 (D. Mass. 1982)(J.A. 59a). At the time, no state appellate court had decided the issue and several state trial judges had already ruled that double jeopardy prevented such an occurance. See Casenote, 15 New England L. Rev. 303, 319 (1981).

Mr. Lydon was convicted at a trial in the first tier of the process, over his objection that the prosecution had failed to present sufficient evidence of one of the elements of the crime: the illegal intent charged in the complaint. After receiving a two-year jail sentence, he exercised the only option Massachusetts law gave him, and requested a trial de novo in the jury session of the Boston Municipal Court. The court released him

on personal recognizance. Among the conditions of his recognizance were that he appear when required, as well as "not depart without leave and in the meantime keep the peace and be of good behavior." M.G.L. Ch. 276 §18.

Prior to his second trial, he moved to dismiss the case against him on the ground that as a matter of law, the evidence in his first trial was insufficient to support his conviction, and therefore the Double Jeopardy Clause barred retrial. The motion was denied without a hearing. Lydon v. Justices, 536 F.Supp. at 649.

Mr. Lydon then sought relief from a Single Justice of the Supreme Judicial Court, who granted a stay of the trial. In the proceedings before the Single Justice, the prosecution conceded that the evidence at Mr. Lydon's trial was not sufficient to support his conviction. (J.A. 17a)

After a hearing, the Single Justice ruled that on the basis of the original transcript, the evidence at Mr. Lydon's trial was insufficient as a matter of law. (J.A. 19a). The Single Justice, however, reserved ruling on the merits of the double jeopardy claim and reported it to the full bench. (J.A. 20a) The Supreme Judicial Court, in a 5-2 decision, ultimately rejected Mr. Lydon's claim and ordered the case to go to trial. Lydon v. Commonwealth, 381 Mass. 356, cert. denied 449 U.S. 1065 (1980). Mr. Lydon remained subject to the conditions of his recognizance.

Mr. Lydon, while incarcerated on an unrelated sentence which has since expired, filed a petition for a writ of habeas corpus in the District Court. The petition sought Mr. Lydon's release from the custody in which the state court judges held him by virtue of his pending trial.

After briefing and argument, the District Court rendered an opinion, Lydon v. Justices of Boston Municipal Court, 536 F.Supp. 647 (D. Mass. 1982)(J.A. 52a), in which it found that the petition met the custody and exhaustion requirements for habeas corpus jurisdiction. Based on its independent review of the transcript of Mr. Lydon's original trial, the court found that the case against him could not rationally support a conviction. Id. at 652 (J.A. 60a). From this finding flowed the conclusion that the Double Jeopardy Clause of the Fifth Amendment prohibited the Commonwealth from trying Mr. Lydon a second time.

The court granted the writ, ordered Mr. Lydon's release and prohibited his retrial. The Commonwealth appealed and obtained a stay, which it sought on the representation that the state would not

move to retry Mr. Lydon pending the disposition of the appeal.

The Court of Appeals affirmed, in a 2-1 decision. Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1 (1st Cir. 1982)(J.A. 62a). The court found that habeas corpus was an appropriate remedy to protect an individual's right to be free from successive trials, and that Mr. Lydon's trial de novo was barred by the Double Jeopardy Clause. In a dissenting opinion, Judge Campbell began by stating "The court may be right." Lydon v. Justices, 698 F.2d at 10 (J.A. 82a), but went on to argue that the Double Jeopardy Clause should not bar Mr. Lydon's trial de novo.

SUMMARY OF THE ARGUMENT

I. The Double Jeopardy Clause of the Fifth Amendment establishes as a fundamental rule that a state may have only one full and fair opportunity to convict someone of a crime. This rule protects the innocent because our system recognizes that successive trials pose not only a personal ordeal for the defendant, but the risk of inaccurate convictions.

All of the reasons to prohibit such trials are present in Mr. Lydon's case. The prosecutor had a full and fair opportunity to present evidence to show that Mr. Lydon committed the crime with which he was charged. After the conviction, the prosecutor conceded that the evidence at the trial was insufficient as a matter of law. The Single Justice who examined the transcript of the trial, and both federal courts, found that the evidence could not

rationally support a guilty verdict. Mr. Lydon therefore deserves whatever protection the Double Jeopardy Clause affords those innocent of the charges they face.

Had the trial judge evaluated the evidence in a rational manner and acquitted Mr. Lydon, double jeopardy would have forever barred a retrial. The fact that the trial judge acted irrationally gives the prosecutor no justification for doing what the Constitution otherwise prohibits.

This Court recognized in Burks v. United States, 437 U.S. 1 (1978), that the Double Jeopardy Clause bars the retrial of a defendant whose conviction rests on insufficient evidence. Burks arose in the context of a conviction reversed on appeal. However, its principle would be an anomoly if it were confined solely to cases where an appellate court reversed a defendant's conviction,

and not to other contexts raising the same question of double jeopardy's consequence for a retrial after an improper conviction based on insufficient evidence. Courts, following the lead of Hudson v. Louisiana, 450 U.S. 40 (1981), have been nearly uniform in applying Burks to other contexts, including habeas corpus cases.

The Commonwealth, despite the fact that a Single Justice of the Supreme Judicial Court ruled that the evidence was insufficient, argues that Burks is inapplicable to Mr. Lydon's trial de novo because no Massachusetts reviewing court ever considered the question of whether the evidence supported the verdict. Aside from ignoring the record, this argument would render the Double Jeopardy Clause meaningless. It would allow states to strip defendants of its protection simply by refusing to engage in the type of review that would

reveal a Double Jeopardy violation in the first place. Massachusetts may not allow its prosecutors a chance to strengthen an insufficient case.

Mr. Lydon's request for a new trial did not waive the protection the Double Jeopardy Clause otherwise affords him. The only option to accepting the original conviction and sentence, that Massachusetts law gives defendants in the de novo system, is requesting a new trial. This is not the type of meaningful choice the Double Jeopardy Clause requires for a valid waiver. Moreover, the Court made clear in Burks that a defendant's request for a new trial does not allow the prosecutor a normally forbidden "second bite at the apple."

Nor did Mr. Lydon's original decision to participate in the de novo system strip him of Burks' protection. The Commonwealth presented no evidence that Mr. Lydon

knowingly relinquished his double jeopardy rights when he made this choice. In fact, the most reasonable conclusion from the record is that Mr. Lydon relied on the application of Burks to the de novo system when he made his election. Massachusetts trial court decisions at the time supported the belief that Burks applied to de novo defendants.

In light of Mr. Lydon's reasonable reliance on Burks, it is unfair to strip him of its protection. This is especially so because the Commonwealth, not Mr. Lydon, bears the responsibility for creating the problem of a second trial. Had the original trial judge evaluated the evidence properly, or had the prosecutor either dismissed the inadequate case or presented sufficient evidence (if it were possible to do so), no double jeopardy question would have arisen. Nothing that Mr. Lydon did contri-

buted to the judge's irrational verdict, nor did the prosecutor find it harder to present a sufficient case because Mr. Lydon had chosen to participate in the de novo system.

Massachusetts may not impose the loss of the protection of the Double Jeopardy Clause as a price on a defendant's entry into the de novo system. Although the Commonwealth need not have a de novo system at all, that fact does not allow it to offer one that is constitutionally defective. After all, states need not allow judges the power to grant new trial motions. But Burks made clear that a state cannot strip a defendant who takes advantage of such a procedure of his protection against a second trial if the evidence was insufficient initially. Burks 437 U.S. at 17-18.

Nor may Massachusetts justify the

forbidden opportunity it wants to afford the prosecutor on the ground that the de novo system offers advantages to defendants in general. Mr. Lydon's rights may not be forfeited for the benefit of others, especially sincesuch a sacrifice is not necessary. The de novo system can easily accomodate Burks either by instituting a waiver process, as Massachusetts has already done, or by allowing a review of the sufficiency of the evidence at the first tier trial, as do other states.

II. The Double Jeopardy Clause provides protection not only against multiple convictions for the same offense, but from the ordeal of having to undergo multiple trials. It is unique among constitutional rights in requiring a remedy before the trial has begun in order to vindicate fully the values it protects.

Since the Double Jeopardy Clause prohibited Massachusetts from subjecting Mr. Lydon to a trial de novo, habeas corpus relief was proper prior to his retrial.

This Court has entertained the merits of a double jeopardy claim that arose in a pre-trial habeas corpus case, Arizona v. Washington, 434 U.S. 497 (1978), and federal courts have uniformly followed this lead. So long as a habeas corpus petitioner has exhausted his state remedies, no interest of federalism requires a state defendant to suffer an irreparable injury to a constitutional interest before obtaining federal relief.

Mr. Lydon has meticulously and exhaustively presented precisely the same issue contained in his habeas corpus petition at every state opportunity available to him. The state's highest court considered the exact constitutional claim on which

Mr. Lydon obtained federal relief. The doctrine of comity requires only that federal courts allow the states a fair opportunity to rule on an issue. The courts of Massachusetts have received just that.

Since the Double Jeopardy Clause bars Mr. Lydon's retrial, then the restraints imposed upon him by the judges of the Boston Municipal Court to ensure his appearance at that trial are restraints in violation of the Constitution. The doctrine of Younger v. Harris, 401 U.S. 37 (1971), does not bar the Court from releasing Mr. Lydon from these restraints. Younger did not stop this Court from considering the merits of a pre-trial habeas corpus petition alleging a double jeopardy violation in Arizona v. Washington. Furthermore, Younger itself recognized certain limits on its application,

401 U.S. at 53. For example, federal courts may intervene when a petitioner has no other remedy and faces an irrevocable loss of his constitutional rights, as Mr. Lydon does. Mr. Lydon cannot protect his constitutional rights by raising his challenge at trial. If he does not obtain federal relief now, he will suffer the very evil the Double Jeopardy Clause was designed to prevent. The First Circuit was correct in following the example of the other Courts of Appeals in holding that Younger is no bar to federal intervention when it is necessary to uphold the Constitution's ban on successive trials.

All the equities favored granting relief to Mr. Lydon. He had undergone one full trial, where even the prosecutor conceded the evidence was insufficient. He had fully exhausted his state remedies. Moreover, the state courts themselves had

indicated, by granting an 11-month stay, that careful consideration of the constitutional claim was more important than a speedy trial.

The cases which deny interlocutory review of double jeopardy claims based on insufficient evidence at a defendant's original trial do not bar Mr. Lydon's claim for three reasons. First, these cases rest on the assumption that the defendant will eventually have review of the evidence at the first trial if he is convicted after the second. However, Massachusetts has stated it will never examine the evidence in Mr. Lydon's first trial. In such a circumstance, the reasons for postponing review do not apply. Second, these cases depend on the rule that the Constitution does not require the states to provide appellate review of criminal convictions. However, this

rule is not relevant to the scope of habeas corpus jurisdiction. Massachusetts may not have to afford its defendants pre-trial review of double jeopardy claims. But Congress has not expressed an intent to limit habeas corpus to those cases where the states must provide appellate review. Habeas corpus is a broader remedy than the bare minimum the Constitution demands of the states themselves. Third, these cases all apply a construction of the phrase "final decisions" which appears in the federal statute pertaining to appellate review (28 U.S.C. §1291), which restricts interlocutory appeals to non-collateral issues. However, the words "final decisions" do not appear in the habeas corpus statutes. Whether an issue is collateral is simply irrelevant to habeas corpus jurisdiction. Habeas corpus has its own doctrines to serve the interest

of efficient adjudication, namely comity and exhaustion, and should not adopt extraneous tests designed to meet the needs of other procedural schemes.

III. Mr. Lydon is currently in the custody of the judges who released him on personal recognizance, by virtue of the conditions they placed on him which restrict his liberty. In holding that Mr. Lydon met the custody requirement of the habeas corpus statutes, the First Circuit followed the clear mandate of this Court in Hensley v. Municipal Court, 411 U.S. 345 (1973), and the unbroken line of federal authority since then.

Hensley held that a defendant released on personal recognizance pending the execution of a sentence, was in custody because he was subject to restraints not shared by the public generally. The Court

specifically noted that its ruling applied to defendants released on personal recognizance prior to a trial. Hensley, 411 U.S. at 353. The Commonwealth is unable to cite a single case to support its contention that Mr. Lydon was not in custody.

Mr. Lydon's conditions of release, in fact, restricted his liberty beyond the terms the Court considered in Hensley. Like Hensley, Mr. Lydon's recognizance required him to appear when ordered, upon pain of a criminal penalty. Mr. Lydon also faced the reimposition of his two year sentence if he failed to appear. Moreover, Mr. Lydon's recognizance required him to appear on any other charge as well. He was also subject to arrest and detention if he failed to "keep the peace and be of good behavior" in the interim. Thus, his position was analogous to a person

on parole, a condition that clearly meets the custody requirement. Jones v. Cunningham, 371 U.S. 236 (1963).

Hensley noted that even if a defendant is in custody prior to his trial, he must still meet the exhaustion requirement to qualify for federal habeas corpus. As a practical matter, then, only defendants raising a double jeopardy claim which they have fully presented to the state courts will be affected by this ruling. Reversing Hensley would simply lead defendants to surrender themselves temporarily to state authorities to establish custody, file a habeas corpus petition, and then regain their release. This behavior would serve no useful purpose.

ARGUMENT

I. RETRIAL OF MICHAEL LYDON AFTER THE PROSECUTION FAILED TO PRODUCE SUFFICIENT EVIDENCE AT HIS FIRST TRIAL WOULD VIOLATE THE DOUBLE JEOPARDY CLAUSE.

The Commonwealth of Massachusetts has brought this Court a request to allow it to place one of its citizens, Michael Lydon, in jeopardy a second time for the same offense. The first time Mr. Lydon was in jeopardy, the Commonwealth had a full and fair opportunity to present evidence that he committed a crime. As the prosecutor conceded in the state courts, the only conclusion a rational person could draw from the evidence at that trial was that Mr. Lydon deserved to go free. This Court must decide if the Double Jeopardy Clause of the United States Constitution allows the Commonwealth to subject Mr. Lydon to a second trial.

A. The Double Jeopardy Clause Protetts the Innocent.

The Double Jeopardy Clause plays a key role in the constitutional scheme of limited government. United States v. Jorn, 400 U.S. 470, 479 (1971). The restrictions it places on the state have an ancient lineage. Its limitation on the government's power is "one of the oldest ideas found in western civilization." Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting). The values the Clause implements recognize that "permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm the Government with a potent instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564 569 (1977). In order to confine this power within safe limits, the Double Jeopardy Clause manifests a "will-

ingness to limit the government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." Jorn, 400 U.S. at 479.

Thus, there is a general rule that restricts the prosecutor to one opportunity. See Arizona v. Washington, 434 U.S. 497, 505 (1978). It recognizes several truths. Forcing a citizen to defend any criminal trial entails a significant financial and emotional strain. Arizona v. Washington, 434 U.S. at 504 n.12-13; Jorn 400 U.S. at 483; Green v. United States 355 U.S. 184, 187 (1957). It also exposes him to the stigma that attends one facing a criminal charge. But perhaps the central purpose of the prohibition against successive trials is to protect innocent defendants. Swisher v. Brady,

438 U.S. 204, 215-16 (1978).

Successive trials present an unacceptable risk to the innocent for several reasons. First, not every finder of fact will view the same case in the same light. Given enough chances , a prosecutor with a weak case may eventually find someone inordinately willing to be convinced of the defendant's guilt. United States v. Wilson, 420 U.S. 332, 352 (1975). Second, having a preview of how a defendant will react to the state's case allows a prosecutor to alter his tactics to make a more persuasive presentation the next time around. Id., United States v. DiFrancesco, 449 U.S. 117, 128 (1980); Tibbs v. Florida, 457 U.S. 31, 43 n.19 (1982). And third, there is an inexorable pressure on witnesses to alter their testimony in successive trials to favor in subtle ways, the side that presents them. Arizona v.

Washington, 434 U.S. at 504 n.14. Any system that allows the prosecutor to try a defendant a second time after failing initially to present a sufficient case for a rational person to find guilt, will increase the risk of convicting some people who did not in fact commit the crimes with which they are charged.

B. Mr. Lydon's Retrial Raises All Of Double Jeopardy's Concerns For The Innocent.

Mr. Lydon's situation presents an especially compelling case to apply the general rule limiting the government to a single trial. The Commonwealth of Massachusetts held a complete trial on the question of guilt. The prosecutor fully questioned all the witnesses that he called. No prosecution evidence was improperly excluded. See Transcript, Appendix C to Habeas Corpus Petition. And yet, the only rational conclusion from the testimony

of all the witnesses is that Mr. Lydon was not guilty. See Lydon v. Justices of the Boston Municipal Court, 536 F.Supp. 647, 652 (D. Mass. 1982). (J.A. 60a).

This is not a case where the government seeks to retry one whose guilt is clear. United States v. Tateo, 377 U.S. 463, 466 (1964). Nothing in the record comes close to establishing that Mr. Lydon committed the crime. Nor is it a case where a retrial is necessary to vindicate "the public's interest in fair trials designed to end in just judgments." Oregon v. Kennedy, 456 U.S. 667, 672 (1982) quoting Wade v. Hunter, 336 U.S. 684, 689 (1949). That interest is satisfied by "affording the prosecutor one full and fair opportunity to present his evidence to the jury." Oregon v. Kennedy, 456 U.S. at 682 (Stevens, J. concurring). But here, the prosecution

had its chance and failed to prove Mr. Lydon's guilt.

Since the Double Jeopardy Clause protects the innocent, it protects Mr. Lydon. There is proof, susceptible of only one rational interpretation, which supports his innocence. Prior to trial, we simply assume someone is innocent. Even after an acquittal, we cannot say that all rational people must agree with a judgment that the defendant deserves to go free. Cf. Fong Foo v. United States, 369 U.S. 141 (1962). But when a defendant establishes that there was not enough evidence to warrant any rational person in convicting him, we have an affirmative demonstration that society has no further interest in making him the object of a criminal sanction.

Thus, the reasons that the Double Jeopardy Clause prohibits successive trials are all manifest in the Commonwealth of Massachusetts' attempt to try Michael Lydon a second time. The transcript of Mr. Lydon's original trial clearly shows he did not commit the crime for which the Commonwealth would like to put him in jail. One must judge his guilt in light of the complaint the prosecutor brought against him. Jackson v. Virginia, 443 U.S. 307, 314 (1979); Sanabria v. United States, 437 U.S 54, 65 (1978). By that standard, he simply may not be punished. Moreover, he has already had to undergo the ordeal of one trial. The consequence of this trial illustrates its traumatic nature. Mr. Lydon stood to lose two years of his freedom as a result. Few people could face repeating this test without considerable anxiety. A second trial can

only be a more ominous prospect in light of the fact that the Massachusetts criminal justice system operated irrationally in its first encounter with Mr. Lydon. He can hardly be faulted for wondering whether a second trial will faithfully apply the law. In addition, the stress of a second trial is enhanced by a concern for exactly how the prosecutor will attempt to supply the evidence that was lacking in his original case. Not every second effort will more accurately reflect the truth than the first.

C. Double Jeopardy Prevents The Prosecutor From Taking a "Second Bite at the Apple."

This Court has held that "a central purpose 'of the prohibition against successive trials 'is to bar 'the prosecution [from] another opportunity to supply evidence which it failed to muster in the first proceeding'." Swisher, 438 U.S. at

216. It is exactly this forbidden "second bite at the apple" that the Commonwealth of Massachusetts is seeking. Despite its acknowledged failure to prove Mr. Lydon's guilt, the Commonwealth is trying to uphold a system that would permit it either to imprison Mr. Lydon for two years on the basis of an irrational conviction, or to try him a second time. Surely, there is no moral justification for the former. And clearly there can be no legitimate reason to allow the prosecutor again to present an insufficient case. A retrial would serve only to permit the Commonwealth of Massachusetts to hone its trial strategy and perfect its evidence - precisely the evil which this Court has stated the Double Jeopardy Clause prohibits. Tibbs v. Florida, 457 U.S. 31, 41 (1982).

Burks v. United States, 437 U.S. 1 (1978) made clear the impermissible nature of a prosecutor's interest in retrying a defendant after an intial failure of proof. Burks was convicted in a Federal District Court of bank robbery, despite having presented an insanity defense. The United States Court of Appeals for the Sixth Circuit found that the evidence of the accused's sanity was insufficient to support the verdict. The Court of Appeals then remanded the case to the District Court to determine, from a balancing of the equities, whether a judgment of acquittal should be entered or a new trial ordered. Burks v. United States, 547 F.2d 968, 970 (6th Cir. 1976). After granting Burks' petition for certiorari, a unanimous Court ruled that the Double Jeopardy Clause bars a retrial when the reversal results from evidentiary insuf-

ficiency as distinguished from trial error. Writing for the Court, Chief Justice Burger stated:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. . . . The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble . . . Since we necessarily afford absolute finality to a [factfinder's] verdict of acquittal -- no matter how erroneous [the] decision--it is difficult to concieve how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the [factfinder] could not properly have returned a verdict of guilty.
>
> [T]he purpose of the[Double Jeopardy] Clause would be negated were we to afford the Government an opportunity for the proverbial "second bite at the apple." Burks, 437 U.S. at 15-17.

In a companion case, the Court held that Burks applies to prosection in state courts. Greene v. Massey, 437 U.S. 19

(1978). Since these two cases, the Court has repeatedly identified this "second crack" for the prosecutor as a key element in determining whether a state's criminal trial scheme violates the Constitution. Id.; Swisher, 438 U.S. at 216; DiFrancesco, 449 U.S. at 140.

D. Double Jeopardy's Protection Depends on the Nature of the Right and Not the Nature of the Court Examining the Claim.

The Commonwealth's attempt to distinguish Burks seizes upon one phrase in that opinion and takes it out of context. The argument elevates form over substance. The Commonwealth insists that the double jeopardy principle which prohibits a "second bite" for the prosecutor applies only if a self-designed "reviewing court" has already declared the evidence insufficient in the prosecutor's first effort. Petitioners' Brief at 59. Since

the Massachusetts trial de novo system declined to look at the sufficiency of the evidence supporting Mr. Lydon's original conviction, the Commonwealth argues that a retrial will do no harm to the values the Double Jeopardy Clause protects.

Hans Christian Andersen illustrated the flaw in this reasoning in one of his fairy tales. "The Emperor's New Clothes," Hans Andersen's Fairy Tales, 74-81 (1958, R. Spinik, Trans.). As all children instinctively realize, the Emperor was naked long before the little boy who watched him pass on parade cried out the fact in public. It was folly for him to act as if he were fully clothed merely because no one had dared say otherwise. The Double Jeopardy Clause is not made of fabric as gossamer as the Emperor's new clothes. It does not disappear

because the state's court system is structured to ignore what the prosecutor has already conceded and two federal courts later affirmed - that Michael Lydon's original conviction lacked a rational basis.

The prohibition against placing a defendant twice in jeopardy is not so fragile that it depends on matters of form rather than substance. Martin Linen Supply Co., 430 U.S. at 571, 582 (Burger, J., dissenting); Burks, 437 U.S. at 11; United States v. Scott, 437 U.S. 82, 96-97 (1978); DiFrancesco, 449 U.S. at 142; Hudson v. Louisiana, 450 U.S. 40, 44 (1981). The principle the Court announced in Burks does not require some pre-existing announcement by a narrowly defined class of "reviewing court," that a conviction rested on insufficient evidence. The Court has already made that point

clear, and every other state and federal court aside from the Massachusetts Supreme Judicial Court in Lydon v. Commonwealth, 381 Mass. 356, 409 N.E. 2d 745, cert. den., 449 U.S. 1065 (1980), has implemented Burks in that manner.

Burks arose in the context of a traditional appellate court declaring that the evidence at the defendant's trial was insufficient as a matter of law. Yet the Court applied Burks in situations other than appellate reversal. In Hudson v. Louisiana, 450 U.S. 40 (1980), after the defendant was convicted, the trial judge granted a motion for a new trial on the ground that the evidence was insufficient as a matter of law to sustain a conviction. This ruling called the Burks principle into play, even though it originated at the trial, not the appellate, level. Id. at 45 n.6.

Tibbs v. Florida, 457 U.S. at 31, also demonstrates the broad application of Burks. At issue in Tibbs was whether double jeopardy barred retrial after an appellate court had reversed a conviction which rested on a sufficient rational basis, but still did not serve the interests of justice because of the weight of the evidence. In finding no double jeopardy violation, the Court emphasized that its ruling did not open the door for state appellate judges to evade Burks simply by basing their reversals on the weight of the evidence and not addressing its sufficiency. Justice O'Connor's opinion stressed that state courts had an obligation under the Due Process Clause to consider the question of evidentiary sufficiency. Tibbs, 457 U.S. at 44-45. They could not simply afford a defendant a new trial without first ensuring that

the original conviction was at least based on a rational view of the evidence. Id. Accord Lewis v. State, 248 Ga. 566, 285 S.E. 2d 179 (1981); French v. Estelle, 692 F.2d 1021 (5th Cir. 1982). The opinion also indicated that a state court's label of the reasons for its action would not bind a federal court considering the Double Jeopardy question. Tibbs, 457 U.S. at 46-47. If the state court's action conflicted with the Due Process guarantee of sufficient evidence, a federal court could bar a second trial. Id. See Carter v. Estelle, 691 F.2d 777, 782 (5th Cir. 1982). If the Burks double jeopardy question depended entirely upon a pre-existing announcement of evidentiary insufficiency by a "reviewing court" somewhere in the state system, the references in Tibbs to the Due Process guarantee of sufficient evidence would have been superfluous.

No state or federal court since Burks has allowed a conviction to stand when the defendant could establish that at a previous trial, the prosecution's evidence was insufficient. If Burks depended on a pre-existing announcement, then a second trial that took place before any judicial ruling that the evidence at the original trial was insufficient would not violate double jeopardy. Yet courts have overturned convictions in such trials on the basis of Burks in a variety of circumstances.

In some cases, for example, a defendant's first trial ends with a hung jury, despite his claim that the evidence was so deficient that he should have been acquitted as a matter of law. If the Burks principle applies only after a reviewing court has declared the evidence insufficient, such a defendant would have no double jeopardy claim if he were convicted

on sufficient evidence in a second trial. Yet every state and federal court that has considered this question has ruled otherwise. United States v. Richardson, 702 F.2d 1079 (D.C. Cir. 1983); United States v. Portsmith Paving Corp., 694 F.2d 312 (4th Cir. 1982) United States v. Becton, 632 F.2d 1294 (5th Cir. 1980); United States v. Carnes, 618 F.2d 68 (9th Cir. 1980); United States v. Balano, 618 F.2d 624 (10th Cir. 1980); Connecticut v. Servalli, 189 Conn. 201, 455 A.2d 852 (1983). Another context in which the problem arises is when a defendant's original conviction is reversed on appeal for trial error, without any explicit consideration of the question of the sufficiency of the evidence. Again, every court to consider the question has accepted the contention that if the evidence were insufficient at the first trial, it would raise a double jeopardy

bar despite the fact that there was no pre-existing announcement to that effect. See United States v. Marolda, 648 F.2d 623 (9th Cir. 1981); United States v. U.S. Gypsum Co., 600 F.2d 414 (3rd Cir. 1979) cert. den., 444 U.S. 884 (1979); United States v. Sneed, 705 F.2d 745 (5th Cir. 1983). Cf. United States v. Jelsma, 630 F.2d 778 (10th Cir. 1980); United States v. Bizzard, 674 F.2d 1382 (11th Cir. 1982), cert. den., 103 S.Ct. 305 (1982).

This interpretation of Burks has not only been applied by appellate courts to cases which arose within the same court system. It has also been the principle which federal courts have used in habeas corpus cases dealing with state convictions. See Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981); Carpenter v. Leibson, 683 F.2d 169 (6th Cir. 1982). Cf. Carter v. Estelle, 691 F. 2d 777,783 (5th

Cir. 1982).

> Although neither Burks nor Green specifically states that a subsubsequent state retrial would violate the double jeopardy clause if a federal habeas corpus court, instead of an appellate court, finds that a state conviction was based on insufficient evidence, there is no reasonable basis for concluding otherwise. It is, after all, the nature of the right, and not the nature of the reviewing court, that bars a retrial if the reviewing court finds that the original conviction was based on constitutionally deficient evidence.

Delk v. Atkinson, 498 F. Supp. 1282, 1285 (M.D. Tenn. 1980), rev'd on other grounds 665 F.2d 90 (6th Cir. 1981). In Delk, the state appellate court expressly found the evidence at the defendant's first trial to be sufficient, yet the federal court reviewed the question under the twin mandates of Jackson v. Virginia and Burks. The District Court here discharged its obligation, which the state courts refused to perform, to make a review

of the evidence. The District Court's determination that the prosecution failed to prove its case thus brings into play the double jeopardy bar of Burks.

E. The State Courts Found the Evidence at Mr. Lydon's Trial Insufficient as a Matter of Law.

Even if the Commonwealth is correct that Burks requires a ruling of evidentiary insufficiency from a reviewing court in the same judicial system as the trial court, the facts of this case bring it within the confines of the Commonwealth's test. Although the trial judge in the second tier of the de novo system declined to examine the transcript of Mr. Lydon's first trial, a Single Justice of the Supreme Judicial Court, exercising his power of superintendenceunder M.G.L. Ch. 211 §3, did review the sufficiency of the evidence. The Single Justice did not

merely assume that the evidence against Mr. Lydon was insufficient. His opinion clearly establishes that he recognized the importance of confronting the double jeopardy question only in a case where the evidence actually was insufficient. (J.A. 16a). He described his conclusion that the evidence was insufficient as a "ruling." (J.A. 19a). The Commonwealth's argument that the Single Justice did not make a finding of law that the evidence was insufficient, Petitioners' Brief at 59 n. 19, requires one to ignore the plain meaning of the term "ruling." Moreover, it requires one to ignore the way that the full bench of the Supreme Judicial Court described what the Single Justice had done. The opinion of the full bench spoke of the Single Justice's "conclusion" about the insufficiency of the evidence. Lydon v. Commonwealth 381 Mass.

at 359 n.6 (J.A. 39a). It is significant for the Commonwealth's argument that the full bench did not use the term "assumption" to describe the Single Justice's action on the question of whether the prosecutor proved his case against Mr. Lydon. The only support the Commonwealth's argument finds in the full bench's opinion is the statement that the "single justice did not sit as a reviewing court." Id. This ipse dixit illustrates the illogic of the Commonwealth's whole way of defining double jeopardy's protection. Evidently, the Commonwealth of Massachusetts would like to interpret Burks to prevent reprosecution not simply after a judge has ruled that the evidence at a defendant's original trial is insufficient, but only if the state court system is willing in addition to bestow the title "reviewing court" on the forum in which the judge

presided. Such a "narrow, grudging application" of the Double Jeopardy Clause, Green, 355 U.S. at 198, would rob it of all significance.

F. Burks Clearly Applies To The De Novo System.

The conclusion that double jeopardy bars Michael Lydon's retrial is fully consistent with the Court's previous treatment of how the Double Jeopardy Clause applies to the Massachusetts de novo system. The Court has recognized that the double jeopardy principles governing defendants in the de novo system are the same as those which apply to cases like Burks. In Ludwig v. Massachusetts, 427 U.S. 618 (1976), the Court decided that double jeopardy has the same consequences for de novo defendants as those who successfully appeal.

> A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of a trial record and gains a reversal of his conviction and a remand of his case for a new trial. Ludwig, 427 U.S. at 631-32.

Thus, the answer to the question of how double jeopardy applies to a de novo defendant is found by analyzing how double jeopardy applies to a defendant who successfully challenges his conviction in an appellate court.

Ludwig supplied the answer to this question by citing United States v. Ball, 163 U.S. 662 (1896), which stood for the general proposition that retrials after successful appeals did not offend the Double Jeopardy Clause. Ludwig concluded that double jeopardy did not bar a trial de novo. However, neither Ludwig nor Ball addressed the situation where the evidence

at the first trial was insufficient. Their failure to recognize the special rule that the Double Jeopardy Clause applies in such cases is understandable in light of the fact that both cases predate Burks. In fact, the Court noted in Burks that much of the confusion surrounding this area of double jeopardy doctrine in prior cases was caused by a failure to keep this distinction clear. Burks, 437 U.S. at 14-15. Thus, while Ludwig's essential analogy is still appropriate, it is incomplete. Ludwig, viewed in light of Burks, must therefore stand for the proposition that retrial after a de novo appeal is proper under the same circumstances as retrial after appellate reversal. In both situations, the Double Jeopardy Clause prevents retrial when there was insufficient evidence at the first proceeding. This interpretation of Ludwig

is the only way to reconcile it with Burks.

G. Mr. Lydon Did Not Waive His Double Jeopardy Protection by Appealing for a Trial De Novo.

Mr. Lydon did not lose the protection Burks affords him by asking for a de novo trial after his conviction. Massachusetts criminal procedure gives defendants no way to avoid the imposition of sentence following conviction in a first tier court except by noting a de novo appeal. Enbinder v. Commonwealth, 368 Mass. 214 (1975). A defendant who appeals rather than accepting a sentence based upon a tainted conviction has not had the type of meaningful choice that is a necessary ingredient of a valid waiver of his double jeopardy rights. Green, 355 U.S. at 192. Both Burks and Hudson recognized that this principle applies as well to a defendant who has requested a new trial.

Burks not only appealed his conviction, but also moved for a new trial. The Court's decision overruled prior cases which implied that retrial after appellate reversal for insufficient evidence was permissible if, in addition to appealing his conviction, the defendant also requested a new trial. Bryan v. United States, 338 U.S. 552 (1950); Yates v. United States, 354 U.S. 298 (1957). These prior cases rested on a waiver theory: that by allowing a new trial, an appellate court merely provided the defendant with the relief that he wanted. The Court squarely rejected this theory in Burks, holding that a defendant's request for a new trial does not affect the conclusion that the Double Jeopardy Clause forbids reprosecution. Burks, 437 U.S. at 17-18. Even if a defendant in the federal system asked for a new trial as his sole remedy, the Double

Jeopardy Clause would prevent any further prosecution if the evidence at his first trial was insufficient. Burks, 437 U.S. at 17. In Hudson in fact, the defendant obtained his ruling that the evidence was insufficient not on appeal but on a motion for a new trial. Hudson, 450 U.S. at 45 n.6.

The de novo system is merely a particular institutionalized version of the new trial. The principle the Court announced in Burks cannot depend on the sufferance of a state legislature which chooses to provide criminal defendants in a first tier court no avenue of relief other than a second trial.

H. Mr. Lydon Did Not Waive Or Forfeit His Double Jeopardy Protection by Choosing the De Novo Procedure Initially.

This conclusion does not change because Mr. Lydon had an original option to avoid the de novo system altogether.

He neither waived nor forfeited the protection Burks affords by this choice.

Double jeopardy is a fundamental right which protects the accuracy of a trial's outcome. Waiver of such a constitutional right is a matter of federal law, and a habeas corpus court must determine if a valid waiver occurred. See Brewer v. Williams, 430 U.S. 387, 404 (1977); Alvarez v. Estelle, 531 F.2d 1319, 1321 (5th Cir. 1976). This Court has held that the appropriate standard for judging the validity of a waiver of double jeopardy is whether there has been "an intentional abandonment or relinquishment of a known right or privilege." Green v. United States, 355 U.S. at 191-92. Where a fundamental right like double jeopardy is at issue, the state bears the burden of proof. Brewer, 430 U.S. at 403. Here, the Commonwealth made no effort to meet

this requirement.

The District Court found:

> There is no evidence that Lydon had a "meaningful choice" and made a voluntary knowing relinquishment of a right," Green v. United States, 1957, 355 U.S. 184, 191-92 in submitting initially to a bench trial since it is not clear that he appreciated that in so doing he was waiving rights protected by the double jeopardy clause.

Lydon v. Justices, 536 F. Supp. at 651.(J.A.5

This finding was amply justified. There was nothing in the record of the case or any feature of the Massachusetts de novo system to support a conclusion that there was a knowing waiver. Lydon v. Commonwealth, 381 Mass. at 371 (Liacos, J., concurring in part and dissenting in part) (J.A. 51a).

This court has established a policy that "indulges every reasonable presumption against waiver." Barker v. Wingo, 407 U.S. 514, 525 (1972) (emphasis added). That presumption alone would support the conclusion of the District Court.

1. Mr. Lydon Reasonably Believed that He Could Both Participate in the De Novo System and Rely on Burks.

Aside from the presumption, however, the most reasonable conclusion from the record is that Mr. Lydon chose the de novo system on the assumption that he could rely on Burks to prevent a second trial if the evidence at the first was insufficient. See Lydon v. Justices, 698 F.2d at 10 (J.A.80a).

Massachusetts law prior to the Supreme Judicial Court's Lydon opinion offered defendants in the de novo system every reason to believe that they could raise a double jeopardy challenge in the second tier of the system based on the insufficiency of the evidence at their first trials. See Casenote, 16 New England L. Rev. 303, 319 (1981). Two Superior Court judges had already accepted the contention. Id. at 320 n.133. The point was so in contention that three Justices of the Supreme Judicial

Court considered the question important enough to be reported to the full bench for decision. Lydon v. Commonwealth, 381 Mass. 356 (1980) (reported by Justice Wilkins); Gibson v. Commonwealth, 381 Mass. 372 (1980) (reported by Justice Quirico); A Juvenile v. Commonwealth, 381 Mass. 379 (1980) (reported by Justice Abrams).

This Court recognized in Engle v. Isaac, 456 U.S. 107, 131-34 (1982), that defense attorneys have an obligation to anticipate changes in the position a state judiciary may take on a constitutional issue. Any attorney who met that obligation would have advised Mr. Lydon that his initial choice to participate in the de novo system did not necessarily commit him to accept a second trial as his sole remedy for an irrational conviction in the first tier of the system.

The record makes clear that at every step along the way, Mr. Lydon acted in a manner consistent with his reliance on Burks. His attorney argued to the orginal trial judge that the evidence was insufficient as a matter of law. Transcript at p.10, Appendix C to Habeas Corpus Petition. As soon as his double jeopardy claim ripened, he presented a motion to the second tier of the de novo system. (J.A. 1a). He vigorously pressed his claim through the state appellate system. In this context, Mr. Lydon's original decision to participate in the de novo system can hardly be equated with a deliberate abandonment of protection against double jeopardy.

2. The Commonwealth of Massachusetts Contributed Far More Significantly to the Need For Retrial Than Mr. Lydon's Choice of the De Novo System.

In light of Mr. Lydon's reliance on

Burks, it is unfair to deny him its protection on the theory that he is responsible for his current predicament. Mr. Lydon had no reason to expect that the state courts would ever put him in his present position by refusing to consider the sufficiency of the evidence at his first trial. If it is appropriate at all to consider Mr. Lydon's responsibility for having to face a second trial, the Court must, as it did in Jeffers v. United States, 432 U.S. 137 (1977), consider also the government's responsibility. Id. at 152 n.20. Here, the two government officials whose power the Double Jeopardy Clause limits, Brown v. Ohio, 432 U.S. 161, 165 (1977), both contributed far more directly to the need for an otherwise forbidden second trial. The original trial judge failed in his responsibility to apply the standard of proof beyond a

reasonable doubt in a rational manner. Mr. Lydon clearly did nothing to prevent the judge from properly evaluating the evidence. Had the judge acted correctly, there would be no double jeopardy problem. The prosecutor bears some responsibility as well. She failed either to dismiss her inadequate case before trial, Cf. American Bar Ass'n. Standards for Criminal Justice: The Prosecution Function, Standard 3-3.9(a) ("A prosecutor should not ... permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction "), or to present sufficient evidence to prove guilt if it were possible to do so. Mr. Lydon's choice to have his trial in the de novo system did nothing to make it harder for the prosecutor to have presented a sufficient case than if he had not exercised that option. Last, the Commonwealth

shares responsibility for refusing to allow the judge in the second tier of the de novo system to review the sufficiency of the evidence at the original trial. To have allowed this review would also have avoided the double jeopardy problem. Under these circumstances, Mr. Lydon's choice to participate in the de novo system did not deprive him of his right against successive trials.

3. Massachusetts May Not Condition Mr. Lydon's Statutory Right to a De Novo Trial on His Forfeiture of the Constitutional Protection Against Double Jeopardy.

Against the background of both Mr. Lydon's reasonable reliance on Burks and the Commonwealth's overwhelming responsibility for the need to conduct a second trial, to exempt the de novo system from an otherwise clear constitutional mandate "exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." Green, 355 U.S. at 194. Forfeiture,

the imposed loss of one's rights against one's will, is an inappropriate legal concept to apply to Mr. Lydon's case.

The Commonwealth of Massachusetts cannot structure its criminal court system to irrevocably deprive de novo defendants of their right not to be placed twice in jeopardy. The fact that Massachusetts need not have a de novo system gives it no license to offer one that is constitutionally defective. See Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972) (availability of trial de novo does not allow state to have a biased judge at first tier trial); Colten v. Kentucky, 407 U.S. 104, 119 (1972) (defendants facing imprisonment must have counsel at first tier trial); Brown v. Vance, 637 F.2d 272, 282 (5th Cir. 1981) (Ward applies even though defendants could have opted for a jury trial rather than first tier de novo trial before biased judge).

There is no more reason to permit a forfeiture of Burks as the price for entry into a de novo system than the forfeiture of the protection afforded by Ward or for that matter, by Blackledge v. Perry, 417 U.S. 21 (1974), or any other case dealing with the requirements the Constitution places on trials in such a system.

Burks establishes, both explicitly and by implication, that a state may not deprive a defendant of the protection of the Double Jeopardy Clause simply because he chose to avail himself of a procedure which the state need not have provided. A state need not give its trial judges the power to sit as a 13th juror and grant a new trial based on the weight of the evidence. Tibbs, 457 U.S. at 42. Yet Burks specifically prohibits a state from forfeiting a defendant's protection against a second trial on the grounds that in addition to appealing his

conviction on the basis of the sufficiency of the evidence, he sought a new trial on the basis of its weight. Burks, 437 U.S. at 17-18. A state also need not offer any appellate review. But Burks clearly implies that a state could not offer defendants an appeal only on the condition that they submit to a second trial if the conviction is reversed for insufficient evidence. Massachusetts may not exact a higher price for using the de novo system than it could for a defendant who uses a new trial motion or appeals a conviction.

Nor can the Commonwealth justify the forbidden second opportunity it wants to give the prosecutor in Mr. Lydon's case on the ground that the de novo system in general seems preferable to a great many defendants. Mr. Lydon's rights may not be forfeited for the benefit of others. Moreover, such a sacrifice is unnecessary.

The integrity of the de novo system does not depend on depriving defendants of the opportunity to obtain a review of the sufficiency of the evidence at their first tier trials. The Pennsylvania de novo system has existed for years giving defendants just such an option. Commonwealth v. Dincel, 457 A.2d 1278 (Pa. Super. Ct. 1983). Cf. Ariz. Rev. Stat. §22-374 (1975) (option of appeal on the record or if record is inadequate trial de novo); Colorado R. Crim. Pro., Rule 37 (g) (same).

Massachusetts has already indicated that double jeopardy issues should be addressed by judges in the second tier of the process. Lydon v. Commonwealth, 381 Mass. at 367 (J.A. 47a). This type of issue is an easy one for them to resolve. It involves no questions of credibility, nor does it require taking any testimony.

It is simply a matter of reviewing the evidence in the record, to determine a clear failure of proof. See Burks, 437 U.S. at 17. The trial transcript here was only 11 pages. It was typical of the relatively simple nature of trials in the first tier of de novo courts. Whatever need a state may validly assert "to experiment in the area of criminal trial procedure and to provide practical advantages to defendants," (Petitioners' Brief at 67) does not require the result the Commonwealth has urged upon this Court.

II. HABEAS CORPUS IS AVAILABLE TO VINDICATE THE CONSTITUTIONAL PROTECTION AGAINST THE ORDEAL OF A SECOND TRIAL FOR THE SAME OFFENSE

Michael Lydon's habeas corpus petition sought the protection of the District Court against being placed twice in jeopardy in violation of his right under the Fifth Amendment to the United States

Constitution. Mr. Lydon used the appropriate vehicle to secure federal vindication of the constitutional right the state denied him.[1] The "resolution of double

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1./ The habeas corpus petition in the District Court based its claim of jurisdiction on both 28 U.S.C. §2241 and 28 U.S.C. §2254. (J.A. 22a) The former section requires that a petitioner be in custody "in violation of the constitution..." 28 U.S.C. §2241 (c)(3). Having alleged facts to show his custody violated his rights under the Double Jeopardy Clause, Mr. Lydon established the court's jurisdiction under section 2241. Section 2254 requires that a petitioner be in custody pursuant to a state court judgment. The action of the state court judge who presided over Mr. Lydon's original trial satisfies the requirement that the custody result from a judgment.

Following his conviction and sentence in the first tier court, Mr. Lydon requested a trial de novo. Pursuant to the statutory mandate, the original trial court entered the case in the jury session, transmitted the papers, and ordered the defendant to appear. M.G.L. Ch. 278, § § 18, 20. The judgment of the first tier court had an immediate effect in restricting Mr. Lydon's liberty by placing him on personal recognizance. Moreover, if Mr. Lydon failed to appear in the jury session or withdrew his de novo appeal, the original conviction and sentence could have been imposed. M.G.L. Ch. 278, § § 24, 25. The effect of such a state court order satisfies the requirement in 28 U.S.C. 2254 that there be a judgment. Cf. Delk v. Atkinson, 498 F. Supp. 1282, 1286 n.5 (M.D. Tenn. 1980), rev'd on other grounds, 665 F.2d 90 (6th Cir. 1981).

jeopardy claims by state trial courts are reviewable not only within the state court system, but in the federal court system by habeas corpus as well." Oregon v. Kennedy, 456 U.S. 667, 675 (1982).

A. Double Jeopardy Prohibits Not Only Multiple Convictions, But the Ordeal of a Second Trial Itself

Because the Double Jeopardy Clause provides protection not only against multiple convictions for the same offense, but the ordeal of multiple trials, Green v. United States, 355 U.S. 184, 187 (1957), Mr. Lydon brought his petition prior to his retrial. To do otherwise would have subjected him to the very evil, a second trial, which the Double Jeopardy Clause was designed to prohibit. Abney v. United States, 431 U.S. 651, 662 (1976). Since the constitutional right at issue, and the rationale for it, would have been violated if Mr.

Lydon had waited until after his second trial to raise his double jeopardy claim, habeas corpus was appropriate prior to retrial in the state courts.

Among all the limitations the Constitution places on the power of the government in criminal cases, only two provisions shield the defendant from simply participating in a criminal trial. The Speech and Debate Clause is one, See United States v. Helstocki, 442 U.S. 500 (1979), and the Double Jeopardy Clause is the other. Cf. United States v. MacDonald, 435 U.S. 850, 860 n.7 (1978) (speedy trial claims do not require pre-trial relief while double jeopardy claims, being unique, do). In order to provide a meaningful remedy, habeas corpus must be available prior to a state trial that threatens either of these rights. Vindication of other constitutional claims, however, can await final conviction.

B. Habeas Corpus Jurisdiction Exists Before Retrial For the Same Offense.

So long as the person seeking federal protection is in custody, it is clear that habeas corpus jurisdiction exists prior to a state criminal trial. See Ex Parte Royall, 117 U.S. 241 (1886); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973). The Commonwealth concedes that pre-trial habeas corpus is proper for cases raising a valid double jeopardy claim. Petitioners' Brief at 52. That concession recognizes the near universal stance of federal courts on this question.

This Court has considered the merits of a habeas corpus petition raising a double jeopardy question prior to trial in a state court. Arizona v. Washington, 434 U.S. 497 (1978). Almost every Court of Appeals has either explicitly approved pre-

trial habeas corpus for double jeopardy claims or followed the Supreme Court's lead and assumed jurisdiction by considering the merits.[2]

C. Mr. Lydon Completely Exhausted All State Remedies.

Aside from presenting a claim which the District Court had jurisdiction to entertain, Mr. Lydon's habeas corpus petition established that no interest

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2/ Sedgwick v. Superior Court, 417 F.Supp. 386 (D.C. 1976), rev'd on other grounds, 584 F.2d 1044 (D.C. Cir, 1978); Benson v. Superior Court of Massachusetts, 663 F.2d 355 (1st Cir. 1981); Drayton v. Hayes, 589 F.2d 117 (2nd Cir. 1979); United States ex rel Russo v. Superior Court of New Jersey, 483 F.2d 7(3rd Cir. 1973), cert. den., 414 U.S. 1023 (1973); Klobuchir v. Pennsylvania, 639 F.2d 966 (3rd Cir. 1981); Winston v. Moore, 452 U.S. 944 (1981) (dissent of J. Rehnquist from denial of cert. in case where 4th Cir. granted pre-trial habeas corpus relief); Baker v. Metcalfe, 489 F.Supp. 930 (D.C. Tex. 1980), rev'd on other grounds, 633 F.2d 1198 (5th Cir. 1981), reh. den., 638 F.2d 1234 (5th Cir. 1981), cert. den., 454 U.S. 974 (1981); Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1981); Gully v. Kunzman, 592 F.2d 283 (6th Cir. 1979); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968); Hartley v. Neely, 701 F.2d 781 (9th Cir. 1983).

of federalism required the court to withhold its consideration. In order to ensure a proper respect for the operation of a state's criminal trial system, federal courts must provide state judges the first opportunity to confront a state defendant's constitutional claims. See Picard v. Conner, 404 U.S. 270 (1971). This exhaustion requirement serves the interest of comity in allowing the states an opportunity to rule on constitutional issues in the most efficient manner. However, once a defendant has exhausted the remedies the state offers him there is no need to postpone federal review. Indeed, it would hardly serve the interest of efficiency to require Mr. Lydon to undergo a second trial before obtaining federal relief. It is clear that the constitution prohibits such a trial, and the state's highest court has already

rejected Mr. Lydon's claim.

Mr. Lydon has meticulously and exhaustively presented precisely the same issue contained in his habeas corpus petition at every state opportunity available to him. At his original trial, Mr. Lydon argued that the prosecution's evidence was not sufficient to sustain a conviction. Transcript at 10, Appendix C to Habeas Corpus Petition. The double jeopardy consequence of this failure was not ripe for argument until Mr. Lydon appeared in the jury session where his second trial was to occur. Mr. Lydon presented the issue of the insufficiency of the evidence and its double jeopardy implication to the jury session judge, who rejected it without a hearing. Lydon v. Justices, 536 F.Supp. at 649 (J.A. 53a). Mr. Lydon sought interlocutory relief from a Single Justice of the Supreme Judicial

Court, who ruled that the evidence was indeed insufficient but reported to the full bench the question of whether the Double Jeopardy Clause barred a retrial. (J.A. 19a-20a) After considering the exact constitutional question that the subsequent habeas corpus petition raised, the Supreme Judicial Court, in a 5-2 decision, rejected Mr. Lydon's argument. Lydon v. Commonwealth, 381 Mass. 356, cert. denied, 449 U.S. 1065 (1980). Mr. Lydon even pursued his quest to the extent of an unsuccessful petition for certiorari.

Comity requires only that federal courts allow the states a fair opportunity to rule on an issue. Smith v. Dignon, 434 U.S. 332 (1978). The courts of the Commonwealth of Massachusetts have received that opportunity. Mr. Lydon need do no more. The Commonwealth's argument that comity required the District Court to wait until

after Mr. Lydon's second trial to consider his double jeopardy claim would leave him without any remedy for a violation of one of the Fifth Amendment's most basic protections. The doctrine of comity assumes that state courts are both competent to decide federal issues and dedicated to upholding constitutional rights. It does not serve that policy to ensure that a remedy comes too late to vindicate fully a defendant's rights. Mr. Lydon need not suffer a forbidden trial to exhaust his state remedies.

D. The District Court Properly Considered the Merits of Mr. Lydon's Double Jeopardy Claim.

The District Court performed its obligation to protect Mr. Lydon's double jeopardy rights when it assumed jurisdiction and reviewed the transcript of the evidence at his original trial. If, as the Common-

wealth concedes, habeas corpus jurisdiction exists to consider a valid double jeopardy issue prior to a pending state trial, then the federal courts must have the power to review the evidence that a petitioner presents in support of his claim. Mr. Lydon's habeas corpus petition alleged that the evidence at his first trial was insufficient as a matter of law (J.A. 22a, 27a ¶ 29). He attached a transcript of the trial as an appendix to his petition. He presented a memorandum to the District Court arguing that it had an independent obligation under Jackson v. Virginia to examine the transcript for sufficiency of the evidence. (Memorandum in opposition to the Commonwealth's motion to dismiss at 7.) The District Court had to review the transcript to determine if Mr. Lydon's double jeopardy claim had substance.

The only other habeas corpus case dealing with a court's responsibility in such circumstances approved the precise course that the District Court took in Mr. Lydon's case. In Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981), the court considered a pre-trial habeas corpus challenge based on a claim that the evidence at the petitioner's first state trial was not sufficient to support a conviction. The petitioner in Delk had been convicted of murder in a state court, and on appeal the Tennessee Supreme Court reversed the conviction for trial error, and remanded the case for a new trial. The state court specifically rejected the petitioner's claim that the evidence at his trial had been sufficient. Prior to retrial, while he was out on bail, the petitioner sought federal habeas corpus to bar a second trial on

double jeopardy grounds. Both the District Court and the Court of Appeals held that habeas corpus jurisdiction was proper, and that the constitutional obligation of a federal court in such a case was to review for itself whether the evidence in the state case met the minimum prescribed by Due Process to support a conviction. Delk, 665 F.2d at 94.

E. There Was No Bar To Granting Relief Once the District Court Determined a Retrial Would Violate the Double Jeopardy Clause.

After concluding that Mr. Lydon's conviction did not meet the standard which Due Process requires, the court properly decided that granting the writ was appropriate. Since double jeopardy prohibited the prosecutor in the Boston Municipal Court from trying Mr. Lydon a second time, the custody by which that court held him for trial was unconstitu-

tional. No reason existed for withholding relief simply because the trial had not yet begun.

The doctrine of Younger v. Harris, 401 U.S. 37 (1971), does not prevent a federal court from granting a writ of habeas corpus prior to a pending state trial to prevent a violation of the Double Jeopardy Clause. This Court's consideration of the merits of a pre-trial habeas corpus claim in Arizona v. Washington, 434 U.S. 497 (1978), without any mention of Younger indicates that if a federal court finds a double jeopardy violation it may grant relief in a pending state case. See Willhauck v. Flanagan, 448 U.S. 1323, 1325 (1980)(statement of Brennan, J., denying a stay pending appeal) ("The principles of Abney...and Harris v. Washington, 404 U.S. 55 (1971)(per curiam) suggest that an exception to Younger for

double jeopardy claims may be appropriate, at least when all state remedies have been exhausted."). Cf. Mincey v. Arizona, 434 U.S. 1343, 1344 (1977)(statement of Rehnquist, J., denying an application for a stay pending a petition for certiorari) (even if the Court granted certiorari to review the petitioner's Fourth Amendment claim, his retrial in the state courts could proceed since the federal right in this case is not like double jeopardy "where protection extends not only to incarceration following trial in violation of the prohibition but to the subjection of the defendant to the second trial at all...[Fourth Amendment] claims must be asserted through normal post-trial avenues of review. Cf. Younger v. Harris, 401 U.S. 37.").

Those Courts of Appeals that have explicitly considered Younger's application

to a pre-trial habeas corpus case raising the question of double jeopardy's bar on successive trials have all concluded that restraint is not necessary. See Jackson v. Superior Court of Massachusetts, 549 F.2d 215 (1st Cir. 1976); Baker v. Metcalfe, 633 F.2d 1198 (5th Cir. 1981); Robinson v. Wade, 686 F.2d 298, 302 n.7 (5th Cir. 1982); Webb v. Court of Common Pleas, 516 F.2d 1034, 1039 n.18 (3rd Cir. 1975). See also Yackle, Post-conviction Remedies (1983 Supp.) p.72. Cf. Steven v. Circuit of Milwaukee, 675 F.2d 946 (7th Cir. 1982) (Younger is a bar where successive trials are not at issue); But see Rasmussen v. White, 502 F.Supp. 237 (E.D. Tex. 1980).

This conclusion makes sense in light of the limits which Younger acknowledged on its policy of restraint. Younger recognized that federal intervention was appropriate in extraordinary circumstances where the person seeking the federal court's pro-

tection had no other remedy and would otherwise suffer an irreparable injury to his constitutional rights. Younger, 401 U.S. at 53. Where a state defendant cannot protect the constitutional right by raising it at trial, Younger recognizes that federal intervention may be proper. Younger, 401 U.S. at 46. Mr. Lydon had no adequate remedy left when he turned to the federal court. The state judiciary had definitively rejected his claim. If the federal court did not grant relief, Mr. Lydon would have irrevocably lost his right to be free of the ordeal of a second trial. Younger, therefore did not pose a barrier to federal relief.

All the equitable considerations in Mr. Lydon's case supported the grant of habeas corpus relief. Mr. Lydon had already undergone one complete trial and

received a two year sentence. A retrial was no trivial matter for him. Cf. Stevens, 675 F.2d at 947. (federal court need not intervene where double jeopardy claimant had not undergone one complete trial). In addition, in establishing the merits of his double jeopardy claim, his habeas corpus petition presented the rather astonishing fact that in the state courts, the prosecutor had conceded that the evidence on which Mr. Lydon's conviction rested was insufficient as a matter of law. (J.A. 26a ¶ 22). Surely such a concession is uncommon enough to warrant a federal court's weighing it in the balance.

Moreover, whatever may be the equities in cases where the state courts have refused to grant interlocutory review of a defendant's double jeopardy claim, Mr. Lydon's trial was stayed for 11 months by the

state's highest court while it gave his case full consideration. (J.A. 4a-5a). At the very least, that was evidence that the Commonwealth of Massachusetts recognized that careful weighing of the double jeopardy claim was more important than a speedy resolution of the pending trial. It also minimized the disruptive effect of federal review on the orderly process of the state's criminal justice system.

Last, Mr. Lydon's petition did not present the type of claim which presaged frivolous litigation by others. The Massachusetts Supreme Judicial Court indicated in its Lydon decision that if the Double Jeopardy Clause prohibited retrying Mr. Lydon, then the judge in the second tier of the de novo system should entertain such claims by others. Lydon, 381 Mass. at 367. (J.A. 47a). In light of the fact that Massachusetts had

in place a means for tightening up the process that lead to Mr. Lydon's predicament, resort to federal courts should not be necessary for future litigants. Moreover, the state courts could avoid the problem altogether by instituting a valid waiver procedure. See Lydon v. Justices, 698 F.2d at 10 (J.A. 81a). This in fact is the course Massachusetts has taken. Commonwealth v. Montanez, 388 Mass. 603, 605, 447 N.E. 2d 660 (1983). Thus, there was no need to withhold relief for fear that federal courts would be flooded with frivolous double jeopardy claims. In any event, since these claims arise prior to a state trial, they will almost always be presented by an attorney rather than by a pro se petitioner. Counsel's preparation of a habeas corpus petition is one guarantee that the issue will not be frivolous. See Allen et. al., Federal Habeas Corpus and

its Reform, 13 Rutgers L. J. 675, 753 (1982).

F. The Limits On Interlocutory Review Do Not Apply To Habeas Corpus

The cases dealing with interlocutory review of a double jeopardy claim based on insufficient evidence at a defendant's original trial do not support a conclusion that the District Court lacked habeas corpus jurisdiction. First, these cases deal only with the question of the timing of an appellate court's examination of the sufficiency of the evidence at a defendant's first trial. Even the cases the Commonwealth relies upon, Petitioners' Brief at 34, concede that eventually, if the defendant is convicted after his second trial, a court must reach this issue. It is against this background that some courts have denied a review prior to the defendant's second trial. The Common-

wealth maintains, however, that no court should ever look at the original trial judge's concededly mistaken ruling that the evidence was sufficient. If no review were the only alternative to a pre-trial review, the cases denying interlocutory review probably would not maintain the same position. See Richardson, 702 F.2d at 1984 (interlocutory review preferable to no review). If Massachusetts had conceded that in the event of a second conviction, it would review the evidence at Mr. Lydon's first trial, then the analogy to the decisions dealing with an interlocutory appeal would be more apt.

Second, the essential premise underlying the cases the Commonwealth relies on simply has nothing to do with the scope of federal habeas corpus jurisdiction. Those courts that have denied interlocutory review of double jeopardy claims based on

insufficient evidence have based their position on the rule that a criminal defendant has no constitutional right to appeal. Richardson, 702 F.2d at 1082 n.21. If that is so, a defendant has no right to an interlocutory appeal, even if failure to provide him one means that he must suffer the loss of his double jeopardy right not to undergo the ordeal of a second trial. Richardson, 702 F.2d at 1084. Thus, the Commonwealth argues that the Constitution does not require Massachusetts to offer interlocutory review of a double jeopardy claim. Petitioners' Brief at 42. However, accepting the position that Massachusetts need not offer such review does not mean that a federal habeas corpus court should refuse to consider the claim as well.

There is no reason to believe that Congress intended the federal courts to exercise their habeas corpus jurisdiction

only in those situations where the Constitution mandates that appellate review must exist. Clearly, if the Constitution would allow a state to eliminate any review of a conviction, such an argument would entirely eliminate all habeas corpus jurisdiction. The simple answer to the Commonwealth's argument is that habeas corpus is a broader remedy than the minimum level of procedural protection that the Constitution requires. There is nothing unusual about Congress enacting a statute that gives citizens a federal forum that goes beyond what the states must provide. The apparent inconsistency between the First Circuit's position in Lydon and the cases denying an interlocutory appeal is nothing more than an instance where one statute provided a broader remedy than did another.

Third, the cases the Commonwealth relies on all depend on interpreting a

phrase in the federal statute dealing with criminal appeals that does not appear in the statutes relevant to this case. The former statute, 28 U.S.C. §1291, restricts federal appellate jurisdiction to "final decisions." The habeas corpus statutes, 28 U.S.C. §§2241, 2254, never mention the words "final decisions." This Court interpreted §1291 in Abney v. United States, 431 U.S. 651 (1976) to require that an issue be collateral to the merits of the case to qualify for an interlocutory appeal. Whether an issue is collateral is not relevant to the application of the habeas corpus statutes.

There is no reason to apply to habeas corpus cases the caselaw interpreting the phrase "final decisions" in the context of §1291. Habeas corpus jurisprudence amply considers the question of efficient judicial administration in

its own doctrine of comity and exhaustion. The Abney test to determine when a double jeopardy ruling is a final decision is not necessary in a habeas corpus context.

III. MR. LYDON'S CONDITIONS OF RELEASE SO RESTRICTED HIS LIBERTY THAT HE MET THE CUSTODY REQUIREMENT OF HABEAS CORPUS

In holding that Mr. Lydon met the jurisdictional requirement of custody in the habeas corpus statutes,[3] the First Circuit followed the clear mandate of this Court in Hensley v. Municipal Court, 411 U.S. 345 (1973). The petitioner in Hensley was free on his own recognizance awaiting the execution of a sentence he had received after his trial and conviction. The Court

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3./ Mr. Lydon is presently in the custody of the judges before whom he is awaiting trial, by virtue of the fact that they have released him on personal recognizance. Baker v. Metcalfe, 489 F.Supp. 930 (N.D. Tex. 1980), rev'd on other grounds 633 F.2d 1198 (5th Cir. 1981)

noted that someone released on personal recognizance is "subject to restraints not shared by the public generally." 411 U.S. at 351, and thus meets the custody requirement. Mr. Lydon is free on his recognizance, having appealed for a trial de novo after a conviction and a two year sentence. The Court's reasons for upholding habeas corpus jurisdiction in Hensley apply as well to this case.

A. The Conditions of Mr. Lydon's Release Placed A Significant Restraint On His Liberty

After Mr. Lydon exercised his option to avoid immediate imposition of the sentence, the trial court released him according to the terms of the Massachusetts statute dealing with de novo appeals. M.G.L. Ch. 278 §18. Petitioners' Brief at A5. That statute imposed restric

tions on his freedom, not shared by the public generally. Comparison to the situation in Hensley shows that Mr. Lydon was in custody for the purpose of habeas corpus jurisdiction.

The Court noted that the defendant in Hensley was not free to come and go as he pleased, since he was under an obligation to appear "at all times and places as ordered by '[a]ny court or magistrate of competent jurisdiction'" 411 U.S. at 351. Moreover, disobedience was itself a criminal offense. Id. The Massachusetts statute requires Mr. Lydon to appear in the jury session on the appointed day and also "at any subsequent time to which the case may be continued...and so from time to time until the final sentence...," M.G.L. c.278 318. Massachusetts also makes failure to appear a separate criminal offense. However, Massachusetts sets a

lower standard than California's "willful failure to appear." Cal. Penal Code §1319.6 In Massachusetts, failure to appear merely "without sufficient excuse" constitutes a criminal offense, M.G.L. c.276 §82A. Thus, Mr. Lydon faced at least as much restraint as Hensley.

The Massachusetts statute, however, imposes restrictions on his liberty that go beyond those in Hensley. Massachusetts requires in addition that the accused "not depart without leave, and in the meantime ...keep the peace and be of good behavior." M.G.L. Ch.278 §18.

The phrase "not depart without leave" means that the court may require the accused to appear not only on the charge to which the recognizance pertains, but on any other charge. Commonwealth v. Teevens, 143 Mass. 210, 214 (1887). This highly restrictive condition "put [s]him as much under

the power of the court as if he had been in custody...," State v. Stout, 11 N.J. Law 147 (1829), cited in Teevens.

The restraints requiring Mr. Lydon to keep the peace and maintain good behavior require that he refrain from unlawful conduct. See Commonwealth v. McNeil, 19 Pick. 127, 130 (Ma. 1837). These restraints go beyond those imposed on Hensley, and match those in Jones v. Cunningham, 371 U.S. 236 (1963) (holding that the restraints of parole meet the custody requirement).

The terms of Jones' parole required him to refrain from violating any penal laws or ordinances. The Court in Jones noted:

> Even the condition which requires petitioner not to violate any penal laws or ordinances, at first blush innocuous, is a significant restraint because it is the Parole Board members or the parole officer who will determine whether such a violation has occurred. 371 U.S. at 242 n.19.

This determination by the Parole Board would include "few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime," id., at 242.

As a general rule, a court has the power to arrest and detain a defendant released on recognizance who has violated a condition of good behavior such as the one imposed on Mr. Lydon. American Bar Association, Standards for Criminal Justice: Pretrial Release, commentary to Standard 10-5.7, at 10-93 (1979). Massachusetts law allows a court to revoke a defendant's recognizance and detain him up to 60 days upon finding probable cause to believe that he has committed a crime during a period of release. M.G.L. Ch. 276 §58. Thus, even though the requirements to keep the peace and maintain good behavior do not impose a substantive restraint on Mr. Lydon's

liberty, they rob him of the procedural safeguards that protect the general public.

The sentence the Commonwealth imposed on Mr. Lydon following his conviction also restricts his liberty. After receiving a two year sentence, Mr. Lydon exercised his option to request a trial de novo. The Commonwealth's argument that a de novo appeal completely wipes out the action of the original trial court is inaccurate in one important respect. The court will reimpose the two year sentence if he fails to appear in the second tier of the de novo system. M.G.L. Ch. 278 §24. The original sentence is thus simply held in abeyance. It. is not a mere theoretical possibility. Mr. Lydon is essentially in the same position as the defendant in Hensley. Each remained "at large under an order of the state court staying execution of his

sentence." 411 U.S. at 347.

B. Hensley Specifically Applies To Pre-Trial Release

Hensley explicitly contemplated that defendants in Mr. Lydon's position would meet the custody requirement of the habeas corpus statutes. In discussing the opinion's impact, the Court stressed that even "where a state defendant is released on bail or on his own recognizance pending trial or pending appeal, he must still contend with the requirements of the exhaustion doctrine." 411 U.S. at 353. (emphasis added). The Court also indicated the relevance of its holding for defendants on personal recognizance prior to a pending criminal trial by its overruling of four former decisions which all held that in such circumstances the custody requirement was not met.[4] The Court stated

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4 Stallings v. Splain, 253 U.S. 339 (1920); Johnson v. Hoy, 227 U.S. 245 (1913); Baker v. Grice, 169 U.S. 284 (1898); Wales v. Whitney, 114 U.S. 564 (1885)

"Insofar as they ... may indicate a narrower reading of the custody requirement, they may no longer be deemed controlling. In none of the decisions on which we today rely ... are these earlier cases cited in the opinions of the Court." 411 U.S. at 350 n.8.

This interpretation of Hensley is uniform throughout the federal system.[5]

5./ United States ex rel Russo v. Superior Court of New Jersey, 483 F.2d 7 (3rd Cir. 1973), cert den., 414 U.S. 1023 (1978); United States ex rel Triano v. Superior Court New Jersey, 393 F.Supp. 1061 (D.C.N.J. 1975), aff'd 523 F.2d 1052 (3rd Cir. 1975), cert den., 423 U.S. 1056 (1976); Baker v. Metcalfe, 489 F.Supp 930 (D.C. Tex. 1980), rev'd on other grounds, 633 F.2d 1198 (5th Cir. 1981), reh. den., 638 F.2d 1234 (5th Cir. 1981), cert. den., 454 U.S. 974 (1981); Delk v. Atkinson, 498 F.Supp. 1282 (D.C. Tenn. 1980), rev'd on other grounds, 665 F.2d 90 (6th Cir. 1981); Sedgwick v. Superior Court 417 F.Supp. 386 (D.C. 1976); Thames v. Justice Superior Court, 383 F.Supp. 41 (D. Mass. 1974); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968).

A leading work on modern habeas corpus stated in 1981, "At this writing it is clear that petitioners subject to the legal restraints attending bail or personal recognizance, either before or after trial ... are in custody for purposes of habeas corpus." Yackle, Postconviction Remedies at 185 (1981). Even the Committee Note to Rule 1, of the Rules Governing Section 2254 Cases in Federal Court, recognizes that the custody requirement "now includes a person who is: . . . at large on his own recognizance . . ." citing both Hensley and Smith v. Dibella, 314 F. Supp. 446 (D. Conn. 1970).[6]

6./ The custody requirement of Section 2241 is the same as in Section 2254. Cf. Triano v. Superior Court, 393 F. Supp. 1061 (D.N.J. 1975) aff'd without opinion 523 F.2d 1052 (3d Cir. 1975), cert. denied, 423 U.S. 1056 (1976).

The Commonwealth is unable to cite even a single case which holds that a defendant released on personal recognizance prior to a pending trial does not meet the custody requirement.

The absence of any dissatisfaction in reported cases with this interpretation of the custody requirement is evidence of the lack of disruption such a policy places on the federal system. As the Court pointed out in Hensley, even a petitioner in custody must exhaust state remedies before invoking a federal court's habeas corpus protection. 411 U.S. at 353. As a practical matter, only defendants raising double jeopardy claims can hope to clear the exhaustion hurdle prior to trial. Thus, the First Circuit's position on custody allows pre-trial habeas corpus only for the narrow class of defendants who can raise a double jeopardy claim

which they have already fully presented to the state courts.

Moreover, the Commonwealth's position on custody would lead to an absurd result. Defendants on personal recognizance or bail pending a state criminal trial who wanted to establish federal habeas corpus jurisdiction would simply surrender themselves to the state courts (or have their sureties do so), present a habeas corpus petition while in custody, and regain their release once they had filed the petition. Cf. Carrafas v. LaVallee, 391 U.S. 234 (1968) (custody determined at time petition is filed; subsequent release does not affect jurisdiction). This behavior would serve no useful purpose.

CONCLUSION

For the reasons stated above the decision of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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